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No. _____

In The

Supreme Court of the United States

October Term, 1992

MARIO CAMPOS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE SINGLE ACT OF PLACING A TELEPHONE CALL TO AN INTERESTED PURCHASER OF COCAINE TO ARRANGE A MEETING BETWEEN THE PURCHASER AND THE PURPORTED SELLER, WITHOUT FURTHER PARTICIPATION BY THE CALLER, CONSTITUTES AN ACT SUFFICIENT TO BRING THE CALLER WITHIN THE AMBIT OF A DRUG CONSPIRACY FORMED SUBSEQUENT TO THE TELEPHONE CALL.

2. WHETHER MERE PROPOSALS TO AN UNDERCOVER AGENT REQUIRING ACCEPTANCE BY THE AGENT BEFORE ACTIVATION CONSTITUTE A CONSPIRACY WHEN THE REQUIRED ACCEPTANCE IS NOT FORTHCOMING AND THE PROPOSALS ARE NEVER PUT INTO EFFECT.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mario Campos petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed the judgment and sentence of the United States District Court for the Eastern District of New York (Carol B. Amon, D.J.). Petitioner was convicted after a jury trial of one count each of conspiracy to possess and possess with intent to distribute cocaine, in violation of 21 U.S.C. 846, conspiracy to launder monetary proceeds of narcotics activity, in violation of 18 U.S.C. 371, and use of a communication facility to facilitate the commission of a narcotics trafficking offense, in violation of 21 U.S.C. 843 (b). He was sentenced to concurrent terms of imprisonment

on each of the convictions as follows: one-hundred and twenty months on the drug conspiracy under Count One, forty-six months on the money laundering conspiracy under Count Three and sixteen months on the telephone offense under Count Four.

OPINIONS BELOW

The judgment of the Court of Appeals was issued on April 5, 1993 upon the denial of a timely petition for a rehearing, and is reproduced in the Appendix at A-1. The Court of Appeals' opinion, issued on February 19, 1993, is reproduced in the Appendix at A-2, and is officially reported at 986 F.2d 35.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

18 U.S.C. §371 provides in pertinent part,

> If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each such person shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. §1956 provides in pertinent part

(a)(1)Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –

* * *

(B) knowing that the transaction is designed in whole or in part – (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity

* * *

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

21 U.S.C. §841 (a)(1) provides in pertinent part

except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

21 U.S.C. §846 provides in pertinent part

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

Count One of the indictment charged that between June 10 and August 9, 1989, the defendants, Edgar Vargas, Jose Jairo Rincon-Maya, Nidia Campos and Mario Campos, conspired to distribute and to possess with intent to distribute in excess of five kilograms of cocaine, in violation of 18 U.S.C. §841 (a)(1). Count Three charged that during the same period Vargas, Nidia Campos and Mario Campos conspired to launder the case proceeds of narcotics trafficking, in violation of 18 U.S.C. §371.

Viewed broadly, the Government maintained that between June 26, 1989 and August 10, 1989, the defendants conspired to purchase for distribution a quantity of cocaine from an undercover agent, Robert Matos, who was posing as a large-scale narcotics dealer. The Government further maintained that the defendants Campos and Vargas were engaged in an on-going money laundering conspiracy, as part of which they offered to provide money-laundering services to Matos.

At a joint trial of all defendants, petitioner and Vargas were found guilty of all the charges. The jury could not reach a verdict with respect to Nidia Campos and co-defendant Rincon-Maya. At a second trial against Nidia Campos,[1] the jury acquitted her of the narcotics

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[1] Rincon-Maya subsequently pleaded guilty to a lesser, substantive cocaine distribution charge, for which he received a sentence of 81 months' imprisonment.

conspiracy, but found her guilty of conspiring to engage in money-laundering.[2]

The Government's trial evidence showed that Matos, posing as a multi-kilo cocaine dealer, had several conversations with Vargas about Vargas purchasing cocaine from Matos. Their initial discussion, on June 9, 1989, focused on the quantity Vargas was interested in purchasing, the price he was willing to pay, and the time of the payments. No agreement was reached at that time other than that Vargas would speak to his "two buyers for the cocaine" and get back to Matos. (JA 7-10)[3]

At some point during that first conversation the topic shifted to Matos' money-laundering needs. In that regard, Vargas told Matos he had a male friend who owned a bar who could convert small bills into large ones for a seven percent fee. However, Matos was looking to ship his cash to Spain, not have it converted. In response, Vargas told him he had a female who laundered money to other countries and that he (Vargas) would speak to her and get a fee quotation.

> Q. At the conclusion of the meeting, what if anything, did Edgar Vargas say to you.

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[2] Mrs. Campos was thereafter sentenced to 54 months of imprisonment and a three year term of supervised release. It should be noted that as of the filing of this petition, Mrs. Campos' independent certiorari petition is pending before this Court.

[3] Parenthetical references preceded by "JA" refer to the pages of the joint appendix submitted in the Court of Appeals.

A. He told me he was going to speak to his associates, the cocaine, and his associates about the money laundering.

JA 12.

On June 20, 1989, Vargas and Matos met in a restaurant in Queens. Vargas told Matos his associates were interested in purchasing 500 kilos of cocaine but were willing to pay for only half on delivery and the balance in fifteen or twenty days. When Matos refused to agree to those arrangements, Vargas stated he would have to speak to his "associates" again. (JA 14-15).

Q. Did you have any further discussion concerning his associates on that day?

A. He explained to me about the percentage. He explained to me he was going to introduce me to his associate the following day, I could speak to "him" about the five hundred kilos of cocaine and speak to "him" about laundering the money, sending money to Spain, and find out the percentage "they" were going to charge me.

JA 15.

The following day, June 21st, Matos and Vargas met and drove to McCabe's Bar in Queens:

Q. When you entered McCabe's bar, what happened?

A. Vargas introduced me to a male by the name of Mario.

[Defendant's identification conceded]

JA 20.

Q. What was Mario doing, if you recall?

A. He was working in the bar.

Q. Was he sanding walls?

A. He was sanding floors.

JA 36.

Q. After he introduced you to Mr. Campos, what happened?

A. Introduced me to Mario, and at that time Mario told me that Vargas stated to him that I got money to be laundered, a lot of money to launder.

Q. Did Mr. Campos say anything else.

A. Yes, he stated what kind of service he could supply me. If I bring him half a million dollars in ones, fives, tens, twenties he could convert them into $100 bills and charge me seven percent.

Q. Seven percent of what?

A. Total cash I bring him.

Q. What did you say in response to that?

A. I told him what I really wanted was my money transferred to another country. I didn't want it exchanged.

Q. Did Mr. Campos say anything else about his ability to transfer money?

A. He told me that's what he does for Mr. Vargas, he brings him $400,000 on a weekly basis and converts it into $100 bills. He brings ones, five, tens, twenties and Mario converts them to $100 bills.

Q. After you told him you wanted to your money sent to another country, what did he say?

A. The one who does it is his wife, he said.

Q. What else did you discuss?

A. Mario told me Vargas told him I smuggle cocaine. He said how much can I bring. I said five hundred kilos every month and a half.

Q. What did he say?

A. To speak to his wife. His wife is interested in purchasing cocaine in large amounts, and currently she is tapped out.

Q. Can you slow down? What happened next?

A. At that time he told me – Mario told me he was going to go to a phone to make a call to tell her – to call his wife to tell her that myself and Vargas wanted to speak to her.

Q. What happened next?

A. At that time he went – told me he was going to a phone. I was speaking to Vargas. Mario came back and told me he spoke to his wife and his wife is there, Nidia, and speak to her about the money laundering and me giving her the cocaine.

Q. Did you observe what direction Mr. Campos walked in?

A. The other side of the bar.

Q. Could you observe whether there was a phone there?

A. No.

Q. What happened next?

> A. Myself and Edgar Vargas exited the bar, entered my vehicle and Edgar Vargas directed me to Costa Rica Realty.

JA 20-22. The entire meeting took place "within a half hour period". JA 36.

From that point there were no further meetings or discussions among any of the participants and Mario Campos. No other evidence, in any form, linking Mario Campos to any of the charges in the indictment was presented. Indeed, the only other reference to Mario Campos in the entirety of the Government's evidence, constituting approximately a thousand pages of transcript and numerous exhibits, was the following reference to him by Vargas during a recorded conversation with Matos on July 14, 1989:

> MATOS: "And that other guy – what's his name? – the . . . the husband of, hmm . . . the husband of the woman, Nidia?
>
> VARGAS: L –, oh his name is –
>
> MATOS: He doesn't want it [the cocaine]?"
>
> VARGAS: *No,* the one who works is Mrs. Nidia."

JA 58-59.

The balance of the Government's proof showed that after leaving McCabe's Bar on June 20, 1989, Agent Matos and Edgar Vargas went to Costa Rica Realty in Queens and spoke to Nidia Campos, petitioner's wife. Matos again presented himself as a large scale cocaine dealer in need of specific money-laundering services. Nidia

allegedly offered to provide those services for a ten percent fee, but Matos considered that fee too high and asked her to lower it. At that meeting Matos told Nidia he imported about 500 kilograms of cocaine every month or so and was willing to sell that quantity to her at a price of $10,000 per kilo. Nidia's response was to tell him that she would discuss these issues further with him through Vargas, her "spokesperson". (T-149-153)[4]

On July 6th and again on July 11th Vargas and Matos met and discussed the purchase of the 500 kilograms of cocaine from Matos. In each instance the discussions focused on Nidia's inability to put together the full purchase price. Vargas told Matos that Nidia wanted the 500 kilos but could only pay $3,000,000 and the balance of $2,000,000 in fifteen days. Matos refused, insisting that the full purchase price had to be paid on delivery. (T-159; 166-167) As for money-laundering, Vargas stated that Nidia would not reduce her fee. (T-160)

On July 14th Matos and Vargas met again and continued their thus-far-inconclusive discussions. During this meeting Vargas told Matos that whatever quantity and price is ultimately agreed to, a male associate of Nidia's would be the one buying the cocaine. (T-174)[5] Also, it was during this discussion that Vargas stated to Matos that

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[4] Parenthetical references preceded by the letter "T" are to the pages of the trial transcript not reproduced in the joint appendix.

[5] It was stipulated at trial that this so-called "second buyer" referred to one of three brothers of co-defendant Jairo Rincon-Maya. (T-199)

petitioner Mario Campos was not involved in the proposed transaction:

> MATOS: "And that other guy – what's his name? – the . . . the husband of, hmm . . . the husband of the woman, Nidia?
>
> VARGAS: L –, oh, his name is –
>
> MATOS: He doesn't want it [the cocaine]?"
>
> VARGAS: *No*, the one who works is Mrs. Nidia."

(JA 58-59)

On July 31st Vargas met with Matos and told him that the "second buyer" was no longer interested in purchasing any amount of cocaine, but Nidia Campos was willing to buy the entire 500 kilos Matos then had available.[6] However, Vargas explained that Nidia would do so only if Matos was willing to "front" the cocaine for eight days. Matos refused. (T-235-238; 244-245)

On August 1st Matos and Vargas went to Nidia's office at the Costa Rica Realty, where Nidia introduced Matos to an individual by the name of "Hector". Hector identified himself to Matos as Nidia's "associate" and asked if Matos would be willing to sell the cocaine 100 kilos at a time to insure that he would be paid on delivery. Matos refused this request as well. (T-268-270)

On August 7th Vargas and Matos met again. During this discussion Vargas informed Matos that the "second

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[6] On July 31st Vargas was shown the 500 Kilograms. (T-241-242)

buyer" – who had previously declined to go forward with the purchase – was now willing to buy 25 kilos.[7] Vargas also said that Nidia would buy 25 kilos every three days until Matos had sold all of the 300 kilos he purportedly had left. (T-274-275)

On August 9th Vargas called Matos and told him he (Vargas) was ready to purchase the 50 kilograms of cocaine. Later that day, Vargas met Matos in Queens and showed Matos the money. Minutes later Vargas was placed under arrest. (T-282-287) After his arrest Vargas agreed to cooperate with the agents and made arrangements by telephone with the second buyer for the second buyer to come and pick up the cocaine. About twenty minutes later the defendant Jose Rincon-Maya showed up and shortly thereafter was placed under arrest. (T-309-316)

The Court of Appeals held that the foregoing evidence was sufficient to establish petitioner's membership in the charged conspiracy:

> Mario, at their June 21 meeting, explored with Matos the subject of narcotics purchases, asking how much cocaine Matos could bring in and plainly having one specific buyer – Nidia – in mind. Mario knew the size of Nidia's operation, the status of her inventory, and her immediate goals: thus, he told Matos that Nidia was "tapped out" and would be interested in purchasing a large quantity of cocaine. Mario telephoned Nidia to tell her about Matos; and he

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[7] It was again stipulated at trial that the second buyer was one of the following persons: Jairo Rincon-Maya, Javier Rincon Maya, Pedro Rincon or Vincente Rincon. (T-274-275)

> urged Matos to go see her. This evidence provided a sufficient basis for a rational juror to infer beyond a reasonable doubt that Mario was well acquainted with Nidia's narcotics operation, that he had agreed, at least implicitly, to assist in that operation, and that he took steps to do so.

App. at A-13.

REASONS WHY THE WRIT SHOULD ISSUE

POINT I

THE SINGLE ACT OF PLACING A TELEPHONE CALL TO AN INTERESTED PURCHASER OF COCAINE TO ARRANGE A MEETING BETWEEN THE PURCHASER AND THE PURPORTED SELLER, WITHOUT FURTHER PARTICIPATION BY THE CALLER, DOES NOT CONSTITUTE AN ACT SUFFICIENT TO BRING THE CALLER WITHIN THE AMBIT OF A DRUG CONSPIRACY FORMED SUBSEQUENT TO THE TELEPHONE CALL.

Mario Campos' telephone call to Nidia Campos was simply insufficient to establish his membership in a conspiracy that formed, if at all, well after that call and without further participation by him.

A conspiracy is an agreement between two or more persons to commit an unlawful act. The essence of the offense is the agreement, the existence of which may be inferred by the acts of the participants. However, to bring an actor within the ambit of a conspiracy, *his own acts* must be such as to demonstrate that he has associated himself with the criminal venture, participated in it as

something he wished to bring about or sought by his action to make it succeed. *United States v. Martino*, 759 F.2d 998, 1002-1003 (2d Cir. 1985); *United States v. Soto*, 716 F.2d 989 (2d Cir. 1983); *United States v. Terrell*, 474 F.2d 872, 875-876 (2d Cir. 1973); *United States v. Freeman*, 498 F.2d 569 (2d Cir. 1974).

Merely assisting another in achieving an unlawful objective, but without agreement, is not sufficient. *United States v. Perry*, 643 F.2d 38 (2d Cir. 1981). *United States v. Wardy*, 777 F.2d 101 (2d Cir. 1985); *United States v. Tyler*, 758 F.2d 66 (2d Cir. 1985). As the Court of Appeals explained in *Tyler*, 758 F.2d at 70-71, quoting *United States v. Bright*, 630 F.2d 804 (5th Cir. 1980):

> [A] defendant may wittingly aid a criminal act and be liable as an aider and abettor but not be liable for conspiracy, which requires knowledge of and voluntary participation in an agreement to do an illegal act.

Under this principle, it has long been the law in the Second Circuit that "membership in a conspiracy is not established by the fact that a defendant told a willing buyer how to make contact with a willing seller." *United States v. Tyler, supra*, 758 F.2d at 69, quoting *United States v. Torres*, 519 F.2d 723, 726 (2d Cir. 1975). See also, *United States v. Hysohion*, 448 F.2d 343 (2d Cir. 1971) ("The fact that Rimbaud told Everett, a willing buyer, how to make contact with a willing seller does not necessarily imply that there was an agreement between the seller and Rimbaud.") See also, *United States v. Thomas*, 468 F.2d 422, 425 (10th Cir. 1972) (mere fact that sister of drug "kingpin" probably knew of his illegal activity and on one occasion introduced members of the conspiracy to each other "to

talk about some business" was insufficient to sustain conviction where there was no other evidence to show that sister possessed or sold drugs or otherwise took part in brother's activities.)

In *United States v. Torres, supra,* the defendant Rivera told a co-conspirator that if the co-conspirator wanted to make money he should establish a relationship with the "connection". On a later occasion Rivera gave the connection a large paper bag filled with money. In reviewing the sufficiency of the evidence against Rivera, the Court stated:

> The conversation alone might have been deficient, since membership in a conspiracy is not established by evidence of mere association with conspirators, or by the fact that a defendant told a willing buyer how to make contact with a willing seller.
>
> * * *
>
> Here, however, Rivera's demonstrated awareness of a conspiracy's existence coupled with his *active participation* more than adequately establishes his status as a conspirator.

Emphasis added; citations omitted.

In *United States v. Tyler, supra,* the government's evidence showed merely that Tyler helped a willing buyer (an undercover agent) locate a willing seller. Reversing the conspiracy conviction, the Court of Appeals stated

> As we have stated in the past, such evidence, standing alone, is insufficient to establish the existence of an agreement between the *facilitator* and the seller. (Emphasis added)

In this case, petitioner is alleged to have done nothing beyond suggesting that Matos (a willing seller) speak to his wife (a willing buyer) about selling her cocaine, and making a telephone call to determine if his wife was then available. While this conduct supports a conclusion that Mario had knowledge of his wife's alleged illegal activities, it does not support an inference that he participated, or intended to participate in them.

At the time petitioner had the discussion with Matos and then made the telephone call to his wife – all within a matter of minutes – there was no conspiracy in existence. Therefore, petitioner's limited conduct was at most preparatory to the formation of the conspiracy. Since there was no further participation by him, petitioner could not be snared in the conspiracy "nunc pro tunc". See *United States v. Melchor-Lopez*, 627 F.2d 886, 892 (9th Cir. 1980) (engaging in exploratory and inconclusive discussions with conspirators is insufficient to establish membership in conspiracy).

Indeed, there was affirmative evidence, in the form of Vargas' recorded discussions with Agent Matos, strongly indicative of Mario Campos' non-involvement in the cocaine conspiracy. When Matos and Vargas were discussing who was going to buy Matos' cocaine, the latter asked Vargas whether Mario Campos was interested. Vargas' reply was "No, the one that works is Nidia."

There is nothing equivocal about that statement. On its face it conveys but one thought, that Mario Campos was not interested in the cocaine affair, an assertion fully supported by petitioner's complete absence from the

scene after his initial discussion with Matos. In short, Vargas' comment harmonized completely with the totality of the government's evidence against Mario Campos. The line between speculation and drawing inferences may be thin, but it is there nonetheless. "[N]o mere suspicion or surmise is permitted to replace the essential analysis of the qualitative nature of the acts in question." *United States v. Melchor-Lopez*, 627 F.2d 886, 891 (9th Cir. 1980), quoting *United States v. Taylor*, 562 F.2d 1345, 1352 (2d Cir. 1977).

Finally, the fact that petitioner was "well acquainted with Nidia's cocaine operation" does not change the analysis, for the critical issue is not merely petitioner's state of knowledge, but his conduct and whether that conduct evinced an intent to join the conspiracy.

For these reasons, the petition for a writ of certiorari should be granted.

POINT II

MERE PROPOSALS TO AN UNDERCOVER AGENT REQUIRING ACCEPTANCE BY THE AGENT BEFORE ACTIVATION DO NOT CONSTITUTE A CONSPIRACY WHEN THE REQUIRED ACCEPTANCE IS NOT FORTHCOMING AND THE PROPOSALS ARE NEVER PUT INTO EFFECT.

In *United States v. Melchor-Lopez*, 627 F.2d 886 (1980), the Ninth Circuit held that exploratory and inconclusive discussions about an illegal venture do not constitute a conspiracy. "The law requires more than a conspiracy to attempt to arrange a purchase; it requires an agreement to carry out an illegal act." Ibid, at 892.

The Eleventh Circuit has expressed a similar view in *United States v. Jones*, 765 F.2d 996, 1003 (1985):

> We cannot say the mere submission of proposals such as we have here, with pre-conditions not met, is a criminal conspiracy without more. The Melchor-Lopez case holds that a partial acceptance of proposals, but stating a precondition not met, is not a conspiracy. We think this is sound and it follow that the mere submission of proposals, incorporating a precondition not met, is not a conspiracy either when the circumstances do not justify an inference of fact that the "agreement" survives the rebuff.

That is precisely the scenario in this case. The indictment clearly and unambiguously alleged that the conspiracy to engage in acts of money laundering was in existence from approximately June 10, 1989 until August 9, 1989. The prosecution chose this definite period advisedly because it fairly and accurately represented the time span during which Special Agent Matos met with the various defendants, assertedly to sell them cocaine and to determine whether they would agree to launder the proceeds of his narcotics activity. Indeed, the two dates correspond precisely with the dates that Matos began his undercover work, June 9th, and with the date on which the defendants were arrested, August 9th. Moreover, each of the four overt acts charged in the indictment are alleged to have occurred on a single day within the period.[8]

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[8] The overt acts alleged under count three of the indictment were that on or about June 21, 1989: 1) Vargas "arranged a meeting" between Matos and Mario Campos; 2) Mario Campos

Thus, these temporal limits identify the conspiracy as having the specific objective of laundering money for Agent Matos. But a fair consideration of the evidence, even viewed in a light most favorable to the government, shows at most that Petitioner and his alleged co-conspirators – his wife and Vargas – did no more than propose to Matos various methods of money laundering, each of which was rejected by Matos, either because he wanted a different form of the service or because the price quoted was too high. Thus, the purported scheme never went beyond the discussion stage.

Although Petitioner acknowledged that he was capable of providing limited services to Matos, there was never any agreement to do so between him and Matos or between Matos and Nidia Campos. Indeed, the only rational inference to be drawn from the trial facts is precisely the opposite one, that there never was conspiratorial agreement because Matos turned down petitioner's and Nidia's alleged overtures. Thus, under the principles expressed in *Melchor-Lopez* and *Jones*, the inconclusive discussions never ripened into a conspiracy.

The Court of Appeals' treatment of this issue implicitly rejects the *Melchor-Lopez* and *Jones* rationale by focusing exclusively on the discussions as evidence of the conspiracy:

> Vargas *described* Mario as his associate and introduced Mario to Matos in connection with the

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met with Matos and discussed money laundering; 3) Nidia Campos met with Matos and discussed money laundering; and 4) Nidia Campos placed a telephone call to an associate to discuss money laundering for Matos.

> latter's professed desire to launder money. Mario *confirmed* Vargas' earlier representation as to Mario's fee. The evidence was ample that Vargas was a narcotics dealer, and Mario *said* that he regularly laundered $400,000 a week for Vargas.
>
> * * *
>
> Vargas also *described* Nidia as his associate. Nidia *confirmed* that she had *discussed* Matos' money-laundering needs with Vargas, and she *advised* Matos that Vargas would thereafter serve as her representative in dealing with Matos. Further, Nidia *stated* that before she could lower the fee for sending money abroad, she had to *consult* with another associate, whom she *telephoned* in Matos' presence. Finally, Mario's phone call to Nidia permitted the inference that he was referring to her the large-bill conversions that he preferred not to handle.

App. at A-12 (Emphasis added)

But the conversations referred to by the Court of Appeals, like those had among the purported conspirators in *Melchor-Lopez* and *Jones*, do not prove agreement, only an attempt to reach one. As the Court pointedly observed in *Jones*, "Of course the law could be written to punish one who seriously contemplated participating in a [money laundering] enterprise, but it has not yet done so". 765 F.2d at 996.

But even assuming *arguendo* that the various meetings and discussions constituted evidence of the formation of the conspiracy as charged in the indictment, under a § 371 conspiracy, as this was, the existence of the illegal agreement is not sufficient; an overt act "to effect the

objects of the conspiracy" is required. Here, each of the overt acts charged in the indictment was a step in the *formation*, not execution of the conspiracy. See footnote 8, supra.

In *Yates v. United States*, 354 U.S. 298, 334 (1957), this Court stated that a principal reason for the overt act requirement in a conspiracy prosecution "is simply to manifest that the conspiracy is at work and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence." A fortiori, then, conduct necessary to the formation of the conspiracy cannot at once constitute an overt act in furtherance thereof.

Yet, that is the clear import of the Court of Appeals' ruling here. The discussions about various money laundering services, and at what price, and Petitioner's limited expression of interest in assisting Matos at most established the formation of the conspiracy, but since Matos rebuffed the various offers no further action was taken by Petitioner, or anyone else, hence the absence of an overt act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
June 4, 1993

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Fifth day of April one thousand nine hundred and ninety-three

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THE UNITED STATES OF AMERICA,

Appellee

- v. -

EDGAR VARGAS, NIDIA CAMPOS and MARIO CAMPOS,

Defendants-Appellants.

DOCKET NUMBER: 92-1094, -1252, -1258

(Filed April 5, 1993)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Defendant-Appellant MARIO CAMPOS.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard

the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT.
ELAINE S. GOLDSMITH, Clerk
By:
/s/ Carolyn Clark Campbell
Carolyn Clark Campbell
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 385, 572, 573 – August Term, 1992

(Argued: November 13, 1992
Decided: February 19, 1993)

Docket Nos. 92-1094,-1252,-1258

UNITED STATES OF AMERICA,

Appellee,

–v.–

EDGAR VARGAS, NIDIA CAMPOS, and MARIO CAMPOS,

Defendants-Appellants.

Before:

NEWMAN, KEARSE, and CARDAMONE,

Circuit Judges.

Appeals from judgments of the United States District Court for the Eastern District of New York, Carol Bagley Amon, *Judge*, convicting defendants of narcotics-related offenses, in violation of 21 U.S.C. §§ 841(a)(1), 843(b), 846, and money-laundering offenses, in violation of 18 U.S.C. §§ 371, 1956(a)(1)(B)(i).

Affirmed.

LINDA B. LAKHDHIR, Assistant United States Attorney, Brooklyn, New York (Andrew J. Maloney, United States Attorney for the Eastern District of New York, Susan Corkery, Assistant United States Attorney, Brooklyn, New York, on the brief), *for Appellee.*

THOMAS H. NOOTER, New York, New York (Freeman, Nooter & Ginsberg, New York, New York, on the brief), *for Defendant-Appellant Vargas.*

MARTIN L. SCHMUKLER, New York, New York (Roger J. Schwarz, New York, New York, on the brief), *for Defendant-Appellant Nidia Campos.*

DOMENICK J. PORCO, New York, New York (Barry Asness, New York, New York, on the brief), *for Defendant-Appellant Mario Campos.*

KEARSE, *Circuit Judge:*

Defendants Edgar Vargas, Nidia Campos, and Mario Campos appeal from final judgments of the United States District Court for the Eastern District of New York convicting them, following a jury trial before Carol Bagley Amon, *Judge,* of narcotics-related and money-laundering offenses. All three defendants were convicted of conspiring to conduct a financial transaction involving the proceeds of narcotics trafficking activity, in violation of 18 U.S.C. §§ 371 and 1956(a)(1)(B)(i) (1988). In addition, Vargas was convicted of possessing and conspiring to possess cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 846 (1988); and Mario Campos was convicted of conspiring to possess cocaine with intent to distribute, in violation of 21 U.S.C. § 846, and of using a communication facility to facilitate the commission of a narcotics trafficking offense, in violation of 21

U.S.C. § 843(b) (1988). Vargas was sentenced principally to a total of 188 months' imprisonment, to be followed by a total of five years of supervised release. Nidia Campos was sentenced principally to 54 months' imprisonment, to be followed by three years of supervised release. Mario Campos was sentenced principally to a total of 120 months' imprisonment, to be followed by a total of five years of supervised release. On appeal, Vargas challenges the calculation of his sentence under the federal Sentencing Guidelines ("Guidelines"); the other defendants contend chiefly that the evidence was insufficient to support their convictions. For the reasons below, we conclude that their contentions are without merit.

I. BACKGROUND

The events at issue here, all of which took place in 1989, were the subject of two trials. The government's evidence was presented principally through the testimony of Drug Enforcement Administration ("DEA") agents, recorded conversations, and telephone records. Taken in the light most favorable to the government, the evidence at the first trial was as follows.

On June 9, while acting in an undercover capacity, DEA Special Agent Robert Matos was introduced to Vargas, who said he was interested in buying 25 kilograms of cocaine at a price of $12,000 per kilo. Matos responded that he had no cocaine at the moment but that he imported 500 kilograms of cocaine every 1½ months; he also said that he did not sell in lots of less than 50 kilograms. Vargas agreed to purchase 50 kilos, with prospects for more in the future.

Vargas and Matos also discussed money laundering. Vargas described one of his associates as a Hispanic man who owned a bar and who could exchange small-denomination bills for $100 bills for ease of transport and concealment. Matos said he wanted to send his money to Spain, and Vargas said he had another associate, a woman, who could launder money by sending it to foreign countries. He told Matos that the male associate's fee for changing small bills into large ones was 7% and that Matos would have to meet the female associate and discuss what percentage she would charge for sending money abroad. Vargas said that his associates could launder as much money as Matos wished and that he would speak to them about the cocaine and the money laundering.

On June 20, Vargas told Matos that Vargas's associates wanted to buy all 500 kilograms of Matos's imminent cocaine shipment. However, they wanted to pay for half of it on delivery and for the other half 15-20 days after delivery. Matos responded that since this would be the first time he had dealt with Vargas, he would require payment in full on delivery. Vargas said he would speak again with his associates. Vargas also said he wanted to introduce Matos to his male associate the next day, and that Matos "could speak to him about the five hundred kilos of cocaine and speak to him about laundering the money, sending money to Spain, and find out the percentage they were going to charge."

On the evening of June 21, Vargas took Matos to a bar in Queens, New York, and introduced him to Mario Campos ("Mario"). Mario said Vargas had told him that Matos had a large amount of money to be laundered.

Mario said he could change a half-million dollars from small bills to $100 bills; he confirmed that his fee would be 7% of the amount changed. He said he routinely changed $400,000 a week for Vargas. Matos told Mario that he did not want the money changed into larger bills but rather wanted it sent to another country. Mario said that the person who performed that service was his wife.

Mario said Vargas had also told him that Matos imported cocaine, and he asked how much Matos could bring in. When Matos responded that he brought in 500 kilograms every 1½ months, Mario suggested that Matos speak to Mario's wife, stating that she was "tapped out" of cocaine and was interested in purchasing large quantities. Mario said he would call his wife and tell her that Matos wanted to speak with her. Mario then went to the other side of the bar; when he returned he said he had spoken to his wife, Nidia, and that Matos and Vargas should go speak with her.

Matos and Vargas promptly left the bar and drove to the offices of Costa Rica Realty, where they met privately with Nidia Campos ("Nidia"). Nidia said Vargas had told her that Matos was a smuggler of large quantities of cocaine and needed her services to launder the proceeds of his drug sales. She asked how much money he needed laundered and said she could provide a variety of services, including setting up fictitious companies to provide a front for his profits, purchasing houses with documentation falsified to hide his ownership, and transferring money to foreign countries. For the last service, Nidia said the fee would be 10% of the cash transferred. Matos responded that he wanted to have his money transferred to Spain but that 10% was too high. Nidia

promptly called another of her associates to arrange to discuss later whether the percentage could be lowered.

Nidia also asked Matos how much cocaine he could import; when told 500 kilos every month or month and a half, she inquired as to the price. Matos quoted her a price of $10,000 per kilo for 500 kilos, or a total of $5 million. Nidia responded that that was a good price and that she was interested in making the purchase. She said Vargas would be the intermediary between herself and Matos, relaying information with regard to the money laundering and the cocaine purchase. She would have Vargas let Matos know whether she would be able to lower the 10% fee for transferring money. As the two men left the realty office, Vargas told Matos that Nidia could purchase the 500 kilos easily.

On July 6, Vargas advised Matos that he had spoken to Nidia and that she could not lower the 10% money-transfer fee. Vargas also said that Nidia wanted to buy the 500 kilos of cocaine but had only $3 million. Vargas suggested that Matos deliver the 500 kilos, receive the $3 million immediately, and receive the remaining $2 million within 15 days. Matos declined to accept less than full payment on delivery.

In late July, Vargas reported that he had two buyers who would be dividing the 500 kilos of cocaine. He also said that if the second buyer backed out, Nidia would take the entire amount. In arranging for delivery, Vargas said that one of Nidia's associates would examine the shipment to verify its purity; he also asked that the cocaine be delivered in a vehicle Vargas could use to take

it to the two buyers. Vargas tried again, still unsuccessfully, to persuade Matos to accept less than the full purchase price on delivery, this time telling him that Nidia was often fronted large amounts of cocaine by the Cali cartel in Colombia. A few days later, Vargas advised Matos that the second buyer had withdrawn but that Nidia would purchase all of the cocaine. Later that day, Matos met Vargas and showed him a van containing 500 kilograms of cocaine. Vargas examined it, declared it satisfactory, and went to see Nidia. He reported back, however, that Nidia now wanted the entire shipment on consignment. He explained that Nidia's associate had negotiated the purchase of 1,000 kilograms of cocaine from another source and that Nidia needed her cash as security for that transaction. Matos refused to deliver the cocaine without receiving payment. On the following day, Matos spoke with both Nidia and her associate, "Hector," who tried to persuade Matos to deliver the cocaine and keep Hector or Vargas as a hostage until payment was received. Matos declined.

In the days that followed, Vargas tried to reach Matos, who refused to return his calls. The two next met on August 7, and Matos said that he had only 300 kilograms of cocaine left. Vargas said that Nidia would purchase 25 kilos every three days until Matos's supply was exhausted; Vargas said his second buyer also wanted 25 kilos at the time of Nidia's first purchase. Thus, Vargas would take 50 kilos in the first delivery, for which he would bring $500,000.

On August 9, Vargas met Matos and gave him bags containing a total of approximately $295,000. Matos directed Vargas to a car in which one kilogram of cocaine

had been placed, telling Vargas that it contained the 50 kilos. After Vargas took the keys, entered the car, and put the keys in the ignition, he was arrested.

Vargas, Nidia, and Mario were charged with conspiring to launder the proceeds of narcotics trafficking activity, in violation of 18 U.S.C. §§ 371 and 1956(a)(1)(B)(i), and with conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. § 846. In addition, Vargas was charged with possessing cocaine with intent to distribute it, in violation of 21 U.S.C. § 841(a)(1); and Mario Campos was charged with using a communication facility to facilitate the commission of a narcotics trafficking offense, in violation of 21 U.S.C. § 843(b). At the first trial, Vargas and Mario were convicted on all of the counts with which they were charged; the jury was unable to reach a verdict as to Nidia. Thereafter, Nidia was retried, with the government presenting, *inter alia*, all of the above evidence of the events involving Nidia. The jury at the retrial found Nidia guilty of the money-laundering conspiracy but not guilty of the narcotics conspiracy.

Defendants were sentenced as indicated above, and these appeals followed.

II. DISCUSSION

On appeal, Mario and Nidia challenge the sufficiency of the evidence to convict them. Vargas challenges the calculation of his sentence. None of their contentions has merit. Only Mario's challenge to the sufficiency of the evidence to convict him on the narcotics conspiracy count warrants extended discussion.

A. *Sufficiency of the Evidence To Convict Mario of Narcotics Conspiracy*

In order to prove a conspiracy, the government "need not present evidence of an explicit agreement; proof of a tacit understanding will suffice." *United States v. Skowronski*, 968 F.2d 242, 247 (2d Cir. 1992); *see United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1191 (2d Cir.), *cert. denied*, 493 U.S. 933 (1989). A conviction for conspiracy must be upheld if there was evidence from which the jury could reasonably have inferred that the defendant knew of the conspiracy charged in the indictment and that he "associat[ed] himself with the venture in some fashion, 'participat[ed] in it as something that he wish[ed] to bring about,' or '[sought] by his action to make it succeed.' " *United States v. Johnson*, 513 F.2d 819, 823 (2d Cir. 1975) (conspiracy conviction reversed in absence of evidence that defendant's presence in automobile, owned and operated by another to import narcotics, reflected other than simply a desire to accompany friend on trip) (quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938); *see, e.g., United States v. Maldonado-Rivera*, 922 F.2d 934, 963 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2858 (1991); *United States v. Sanchez Solis*, 882 F.2d 693, 696 (2d Cir. 1989); *United States v. Gaviria*, 740 F.2d 174, 183 (2d Cir. 1984). A defendant's knowledge of the conspiracy and his participation in it with criminal intent may be established through circumstantial evidence. *See, e.g., United States v. Skowronski*, 968 F.2d at 247; *United States v. Villegas*, 899 F.2d 1324, 1338-39 (2d Cir.), *cert. denied*, 111 S. Ct. 535 (1990); *United States v. Tutino*, 883 F.2d 1125, 1129 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990).

In reviewing a challenge to the sufficiency of the evidence to support a conviction, we must credit every inference that could have been drawn in the government's favor, *see, e.g., United States v. Bagaric*, 706 F.2d 42, 64 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983); *United States v. Carson*, 702 F.2d 351, 361 (2d Cir.), *cert. denied*, 462 U.S. 1108 (1983), and we must affirm the conviction so long as, from the inferences reasonably drawn, the jury might fairly have concluded guilt beyond a reasonable doubt, *see, e.g., United States v. Buck*, 804 F.2d 239, 242 (2d Cir. 1986); *United States v. Taylor*, 464 F.2d 240, 244-45 (2d Cir. 1972). The conviction must be upheld if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original).

Mario contends that all he did was make one telephone call to Nidia and that that was insufficient to support his conviction on the narcotics conspiracy count. He relied principally on *United States v. Tyler*, 758 F.2d 66 (2d Cir. 1985), and *United States v. Hysohion*, 448 F.2d 343 (2d Cir. 1971), arguing that merely helping a willing buyer to make contact with a willing seller does not establish a conspiracy. Though the legal premise is sound, it does not govern the present case. In *Tyler*, we reversed the conspiracy conviction of the defendant Tyler, who had introduced an undercover police officer, Baxter, to one Bennett, who in turn sold Baxter heroin. Tyler had encountered Baxter on the street and, when advised that Baxter wanted "some good dope," sought to help him. Tyler first approached one man but eventually did not recommend buying from him "because there was a lot of dope on the street that was not good." Tyler next

approached Bennett. Baxter and Bennett then moved away from Tyler and completed the transaction; when Baxter eventually turned and walked back, Tyler asked him for some change. *United States v. Tyler* 758 F.2d at 67. We held that this evidence, which showed merely that Tyler helped a willing buyer locate a willing seller, was insufficient to prove a conspiracy between Tyler and Bennett:

> Conspicuously absent from this scenario is any evidence that Tyler asked Baxter how much heroin he sought to purchase, that Tyler indicated that he had a specific source of heroin in mind for Baxter, that Tyler knew where to find Bennett or expected him to be in the area, or that Tyler had made any previous deals with Bennett.

Id. at 68-69.

The evidence here, viewed in the light most favorable to the government, was substantially more probative. Vargas had described both Mario and Nidia to Matos as his "associate[s]," and on June 20 he said Matos could speak to his male associate not only about money laundering but also about the 500 kilos of cocaine. Before introducing Matos to Mario on June 21, Vargas, himself plainly a narcotics trafficker, had discussed Matos's supposed importation of cocaine with Mario. Mario, at their June 21 meeting, explored with Matos the subject of narcotics purchases, asking how much cocaine Matos could bring in and plainly having one specific buyer – Nidia – in mind. Mario knew the size of Nidia's operation, the status of her inventory, and her immediate goals; thus, he told Matos that Nidia was "tapped out" and

would be interested in purchasing a large quantity of cocaine. Mario telephoned Nidia to tell her about Matos; and he urged Matos to go see her. This evidence provided a sufficient basis for a rational juror to infer beyond a reasonable doubt that Mario was well acquainted with Nidia's narcotics operation, that he had agreed, at least implicitly, to assist in that operation, and that he took steps to do so.

B. *Other Sufficiency Challenges*

Other sufficiency challenges include arguments by both Mario and Nidia that the evidence was insufficient to support their convictions for money-laundering conspiracy. These challenges are frivolous. Mario and Vargas were plainly coconspirators in a money-laundering operation. Vargas described Mario as his associate and introduced Mario to Matos in connection with the latter's professed desire to launder money. Mario confirmed Vargas's earlier representation as to Mario's fee. The evidence was ample that Vargas was a narcotics dealer, and Mario said that he regularly laundered $400,000 a week for Vargas. The evidence thus plainly showed a conspiracy at least between Mario and Vargas.

Vargas also had described Nidia as his associate. Nidia confirmed that she had discussed Matos's money-laundering need with Vargas, and she advised Matos that Vargas would thereafter serve as her representative in dealing with Matos. Further, Nidia stated that before she could lower the fee for sending money abroad, she had to consult with another associate, whom she telephoned in Matos's presence. Finally, Mario's phone call to Nidia

permitted the inference that he was referring to her the large-bill conversions that he preferred not to handle. The evidence was thus ample to show that the conspiracy included the money-laundering arrangements at least between Nidia and Vargas, and between Nidia and another. *See, e.g., United States v. LoRusso,* 695 F.2d 45, 56 n.8 (2d Cir. 1982) (defendant's own statement referring to "his people" provided evidence that he had entered into agreements with others), *cert. denied,* 460 U.S. 1070 (1983).

C. *Vargas's Challenges to his Sentence*

Vargas contends that the sentencing court erred in calculating his offense level under the Guidelines. He contends principally that the court (a) should have found that he was incapable of purchasing as much as 50 kilograms of cocaine, and (b) should not have increased his offense level for obstruction of justice. His contentions are meritless.

Vargas argues that because he delivered only $295,000 for the transaction on August 9, the sentencing court, in light of the $10,000 per kilogram price, should have found that he was not capable of purchasing as much as 50 kilograms of cocaine, which would have cost $500,000. We reject this contention in light of the ample evidence of the ability of Vargas and his associates to purchase 50 kilograms or more. The record included evidence that when Vargas and Matos first met, Vargas showed him records of a 60-kilogram purchase Vargas had recently made. Further, Vargas consistently represented that his associates had at least $3 million available for the purchase of cocaine, and he repeatedly attempted

to persuade Matos to sell 500 kilograms partially on consignment, promising to pay for at least half of that amount on delivery. In addition, following his arrest, Vargas told the agents that $5 million would have been forthcoming within 20 days for 500 kilos of cocaine. The district court's finding that Vargas was capable of purchasing 50 or more kilograms of cocaine was not clearly erroneous.

Vargas's challenge to the two-level increase in his offense level under § 3C1.1 of the Guidelines for willful obstruction of justice, on the ground that his obstructive acts were not willful, has no greater merit. It is established that in order to enhance a defendant's sentence under Guidelines § 3C1.1, the sentencing court must find that "the defendant consciously act[ed] with the *purpose* of obstructing justice." *United States v. Stroud,* 893 F.2d 504, 507 (2d Cir. 1990) (emphasis in original); *see also United States v. Bonds,* 933 F.2d 152, 154 (2d Cir. 1991) (per curiam); *United States v. Thomas-Hamilton,* 907 F.2d 282, 285 (2d Cir. 1990); *United States v. Altman,* 901 F.2d 1161, 1164 (2d Cir. 1990). And we have ruled that mere flight from an arresting officer to avoid capture in the immediate aftermath of a crime does not of itself constitute an obstruction of justice within the meaning of that provision. *United States v. Stroud,* 893 F.2d at 508.

Vargas, however, did not merely flee to avoid capture in the immediate aftermath of the crime. He had already been apprehended and had agreed to cooperate in a controlled delivery to his second buyer. When the buyer appeared. Vargas yelled something, leapt over the hood of the surveilling agents' car, and attempted to escape. When one of the agents caught him and pinned him to

the ground, he grabbed the agent's gun. Though Vargas claims that his actions were prompted by fear, the court's finding that Vargas grabbed the officer's gun with the intent to obstruct justice was not clearly erroneous.

CONCLUSION

We have considered all of defendants' arguments on these appeals and have found them to be without merit. The judgments of conviction are affirmed.